

DOCUMENT RESUME

ED 250 767

EA 017 237

AUTHOR Ball, William Bentley
 TITLE Parental Rights in Schooling.
 PUB DATE 84
 NOTE 28p.; In: Marshner, Connaught, Ed. A Blueprint for Education Reform. p11-37. For the complete document, see EA 017 236.
 PUB TYPE Viewpoints (120)
 EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
 DESCRIPTORS Court Litigation; Discriminatory Legislation; *Educational Change; *Educational Improvement; Educational Legislation; Finance Reform; Foundations of Education; Government Role; Intellectual Freedom; *Parent Rights; Politics of Education; *Private Education; *Public Education; Religious Discrimination; School Choice; School Taxes
 IDENTIFIERS Pluralism; Secularism

ABSTRACT

Parental rights in schooling, which protect parents' entitlement to provide for the education of their children, are discussed in this chapter. The courts and legislatures are being forced to deal with these rights. Further, churches, schools, and parents are pressed to define and better protect parental rights, because of the following situations: (1) the widespread denial of intellectual, moral, and religious liberty in public education--and concurrent establishment of the religion of secularism; (2) the growing efforts of state education bureaucracies to supervise all education; and (3) the growth of the home education movement. A continued defense of parental rights in education in the courts and legislatures and a restructuring of the school tax to allow tax relief for parents who choose private education will allow for philosophical pluralism in American education, the healthful existence of genuine parental choice for schooling, and the consequent reduction of the danger of a totalitarian society. (DCS)

 * Reproductions supplied by EDRS are the best that can be made *
 * from the original document. *

X This document has been reproduced as
received from the person or organization
originating it.
Minor changes have been made to improve
reproduction quality.

- Points of view or opinions stated in this docu-
ment do not necessarily represent official NIE
position or policy.

"PERMISSION TO REPRODUCE THIS
MATERIAL IN MICROFICHE ONLY
HAS BEEN GRANTED BY

ONE

Connaught
Marshall

TO THE EDUCATIONAL RESOURCES
INFORMATION CENTER (ERIC)."

Parental Rights in Schooling

William Bentley Ball

THE PARENTAL RIGHT

"Parental rights" is a broad topic indeed, within which are encompassed many sub-topics. The "parental rights" involved in the Baby Jane Doe case may be different from those of Amish parents in the *Yoder*¹ case. Has the parent whose nights are spent before the tavern TV the same rights as the parent who nurtures the gift which is a child? "Family rights"—a term of some currency—has many meanings, too, one of these implying rights in children as co-governors of the family. This chapter will touch upon "family rights" and the sometimes implied "child rights" but only as part of its single focus: protection of parents, as the people solely entitled to provide for the *education* of their children.

"Solely entitled": is not society both originally and ultimately responsible to assure that the child is educated, with the parent allowed a fairly wide range of choices within a broad prescription by the state? For two reasons—one negative, one positive: no. The negative reason is that, once we say that the parental right is a species of societal right, we have made the parent an agent of the state, and the parental "right" a mere revocable, constantly qualifiable, privilege. The positive reason brings to the fore one of

ED250767

EA 017 237

those propositions—not unlike the abortion question—upon which citizens seem savagely divided: that, by virtue of parentage, one's child is one's own, to nurture and to guide.

Directly impinging upon the question of parental rights in education is the overall issue of subsidiarity, or the principle that government should not undertake to perform those works which individuals or voluntary associations can accomplish through their own initiative and industry. That is obviously a self-evident principle of freedom within a society and will be rejected only by those who conceive that freedom is not to be preferred to the "security" supposedly afforded by governmental patternizing of all people.

Some see the parental right in education as absolute. Others see it, in the civil order, as a right parallel to the right of other bodies to educate.² Some churches, for example, view their schools as mere surrogates of parents. And most state educational bureaucracies in America view the state as not merely a superior educator but as the sole educator. Powerful groups advocate that view, while there are some who concede no role whatever to the state in respect to the educating of children. Some churches which operate schools conceive that the church has a fundamental right to educate.³ It can be said that, predominantly, America's religious schools emphasize the right of parents to educate, against the assumption that it is the state which shall define, prescribe and enforce education.

But does not that view give sanction to child abuse or child slavery? Indeed, does it not actually encourage ignorance, third-rate education, shoddy schools? And therefore does this not threaten an absence, in the coming generations, of knowledge of the democratic society and of the citizen's proper functioning within it? Such questions are often posed in the American court cases now widely testing the parental right. It is well that they are, since they at once put into issue the interesting matter of what is happening to children in those schools which the state totally funds and totally governs. At this point, however, it suffices to answer that there exists, of course, the ultimate power in us all, as a

Parental Rights in Schooling

society, to utilize the law to restrain great and manifest evil. The law may be invoked to prevent grave, actual abuses of their children by parents. Discussed later herein, this power is extremely limited in scope. There plainly exists, however, another aspect of state power, to which reference is rarely made: the state's protective function. As one scholar has well stated it:

The state's first and most basic function in education is to so dispose of and regulate the factors operating in society that the primary educators may do the work God and nature itself have assigned to them.⁴

In the text "primary educators" referred to church and parent; their *freedom* to educate must be protected.

The "primary" parental right: is it also a plenary right? What, in other words, of child rights? I am aware that there exists (nay, thrives) a well organized movement which pressures legislatures, governmental agencies, and courts to center upon the child a weaponry of rights which either he may assert or which may be asserted on his behalf by a force outside the family—namely, government. "Child rights" become essentially government rights. And just as in the field of education there is a school of thought which holds government to be the superior educator, so in the field of child care there has emerged the view that government is the superior parent.⁵

Private education in America today consists of education provided by schools and of non-school education being provided by families. A large majority of the private schools are religious, and, although national statistics on home education are not available⁶, some—perhaps much—of that education is also religious in motivation and content. The religious bodies operating schools appear to agree that the right of parents to determine the education of their children is primary—antecedent to rights of society. Unhappily, in practice the right has not always been rendered clear by religious organizations.

This ambiguity is doubtless due to the fact that, over the past few decades, those larger churches which operate

schools either have desired to accommodate state demands, or have not perceived state demands as trespassing upon their liberties⁷, or have not actually encountered any jarring intrusions by the state. Further, in many of those instances where private schools have become involved in litigation with the state, parents have not been parties. The schools or churches have sometimes spoken for them, or have ignored their existence, or the parents have expressed no knowledge of, or interest in, their rights, or the judges have ignored their presence.⁸

Three situations today, however, bring issues of parental rights in the U.S.A. to the fore, and may force our courts and legislatures to come to grips with them in ways they may not previously have done. But these situations must also press schools, churches and parents themselves to better define parental rights in education—and to better protect them. The three situations are: (a) the widespread derial of intellectual, moral and religious liberty in public education, (b) the growing efforts of state education bureaucracies to supervise education and (c) the growth of the home education movement. This chapter deals with (a) and (b).

THE SITUATION IN THE PUBLIC SCHOOLS

The Establishing of Secularism (1947-1963)

Doubtless the great majority of parents whose children are enrolled¹ in public schools find little if anything objectionable in the schools in terms of intellectual liberty, morality or religion. To a great extent the American public school today at once reflects—while it also complements, or indeed helps form—the outlook of the community in which it exists. And that outlook is also formed by views and attitudes presented through media which now pervade—with predictable and sometimes automatic results—the dwelling place of virtually every human being in the land. Those views and attitudes are in turn those of the individuals who write the news, the entertainment formats and scenarios, the spoken and written editorials, obvious or concealed. Those views and attitudes have been carefully

identified by Lichter and Rothman in their study, "Media and Business Elites".⁹

Therefore we must accept the fact that most parents having children in public schools have no objection, for example, to secular humanist values expounded throughout the curriculum or to sex education programs which may assume or even promote unchastity. They have no objection to the shut-out of religion and often not to the allowance of dishonesty, slovenliness, or even violence. This is not to say that public schools in all communities have these characteristics; it is merely to say that the widespread existence of such traits has quite evidently not occasioned a popular parental revolt. But even though a thousand public school parents may testify that they are good, patriotic, or even religious, citizens and that they find nothing objectionable in their public school, the objection of a single parent who *does* conscientiously object must not be deemed foreclosed. In testing a civil right, the questions are *not*: "What does the majority think? What is the consensus?" If these indicate the constitutional standard, then movie censorship laws, racially oppressive laws and no end of other laws adopted by elected representatives of the people, which have been held by the courts to suppress rights of minorities, or even of individuals—would remain today on the books and enforceable.

It becomes important at this point to know what the Supreme Court of the United States has held with respect to the liberties of parents of public school children. The Court has been praised for its series of decisions, starting with the *McColum* case in 1948¹⁰ relating to parental rights. These decisions were responsive to suits brought by parents¹¹ to rid the public schools of theistic religious practices. They were thus decisions favoring *some* parents. They in fact denied parental rights of many other parents. The unfortunate effect of these decisions today is not merely one of deprivation of religious, moral and intellectual liberties for many parents, but of opening the door to actual and intolerable impositions of values and attitudes upon the minds of their children.

McColum, and its two successor decisions, *Engel*¹² and

*Schempp*¹³, presented the nation with constitutional inventing¹⁴—borrowed, one must add, from the guiding briefs of national organizations which appeared to be the true parties in interest in these test cases.¹⁵ More important to the present inquiry are the principles developed by the Supreme Court in those cases in respect to parental rights in education.

McCollum represents a devastating and historic blow to parental liberties—and to community consensus, pluralism and religious liberty. In the year the case was started, the School District of Champaign, Illinois, had, with great labor, brought into being a plan which it deemed to be a beneficent device for the accommodation, within the public schools, of the religious liberty of children (and relatedly of their parents). Heedless that it might be taking a first step toward rendering the public schools, not religiously "neutral", but religiously secularist, the Court voided the plan. The plan was the product of deliberations by a council made up of interested Jews, Catholics and Protestants. Under the plan, the local board of education permitted weekly classes in religious instruction to take place on public school premises in grades four through nine. No child was required to participate. No expense to the School District was involved, the instructors being the employees of the interreligious council. The parent initiated the child's participation through signing a card requesting the instruction. The instructors were subject to approval by the superintendent of schools, this apparently to insure that persons promising harm to children or disruption of the regimen of the school could be kept out. The evidence established that this provision had never been employed to deny access to any religion's representative. It was further found by the trial court that the religious education classes (with which, by the time of trial, there had been five years experience) had not been promotive of sectarian differences, but had in effect "fostered tolerance rather than intolerance." As against the acceptance and support of the program by a majority of the parents, one parent, Mrs. Vashti McCollum, who described herself as a

"rationalist", sought to end the program. In the Supreme Court she prevailed.¹⁶ The bases for the Court's decision become interesting to reexamine in 1984, when the cumulative effect of decades of parental frustration over denial of religious liberty for children in public schools has apparently reached an explosive pitch.

The Court's opinion (by Justice Black) was erected upon the sands of Justice Black's *Everson* opinion—his imaginative (and historically inaccurate) picture of the meaning of the Establishment Clause. The Court's point was that the use made of "tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council" violated the principle of absolute church-state separation. The Court ignored all facts contained in the trial record which showed how salutary the program was in accommodating the liberties of students and parents, or how the program offended no one except the pressure groups which had conveyed Mrs. McCollum to her victory. While the lady's interest in obliterating the program appeared to be less that of a parent than that of a "rationalist", the interests of all the other parents did not intrude upon the Court's thinking. Not once in the opinion of the Court appears a single line devoted to *their* equities. Justice Felix Frankfurter penned a long concurrence likewise expressing no concern for them, but going on to say how children who did not participate in the program would be harmed. Evidence of those dreadful consequences, however, was nowhere to be found in the record. No parent or child, victimized by the program, had given evidence at the trial of any trauma the program caused. The harm was indeed of a more incorporeal sort: harm to a "*principle*"—*i.e.*, to a narrow philosophic prejudice insistent that *its* values be imposed as superior to any parental rights.

Thus the Court destroyed a socially valuable community agreement which, over the years, had been painstakingly developed. An important value of the program lay in encouraging religious pluralism—a value later said in Court opinions to be important.¹⁷ The greater damage,

however, was the damage to the proper interests of religious parents; furthermore the Court had now set the stage for the total establishment of secularism in the public schools which would be accomplished fifteen years later.

Engel v. Vitale was an action by the parents of public school pupils to bar use, in their school, of a prayer¹⁸ composed by a governmental body, the New York Board of Regents. The prayer was to be recited aloud; no pupil was to be compelled to participate if his parents objected. School authorities were forbidden to comment upon non-participation of any student, students being permitted to remain silent or to be excused entirely from the exercise. The parents who sued included "members of the Jewish faith, of the Society For Ethical Culture, of the Unitarian Church, and one non-believer." They claimed that the prayer practice violated the Establishment Clause of the First Amendment. After the case was underway other parents intervened, claiming that to ban the practice violated rights of theirs protected by the Free Exercise Clause of the same amendment. The Supreme Court held the program to be void as an establishment of religion, and what is remarkable about its opinion is its reliance upon irrelevant history and its complete failure even to mention the asserted parental rights of the intervening parents. The historical props by which the Court, in lengthy footnotes, sought to support its opinion ranged from the Inquisition through the depredations upon religion of Mary Tudor and Elizabeth I, the persecutions of John Bunyan and Roger Williams and the Virginia assessments against which Madison had inveighed. The Court summarized its key point: "... the historical fact that governmentally established religions and religious persecution go hand in hand." In other words, the 24-word prayer—in spite of the procedural safeguards which had been attached to its use—set the stage for religious persecution in New York. In fact there existed no credible connection whatever between the prayer program and the dreadful historical episodes with which the footnotes were threaded. And this scholarly-looking hyperbole sufficed to render any discussion of the parental rights of the intervenors unnecessary. Thus was ignored a wise earlier admoni-

tion of the New York Court of Appeals (which had upheld the prayer program). It had quoted a statement of a Mr. Spencer, the State Superintendent of Schools in 1839:

*Both parties have rights; the one to bring up their children in the practice of publicly thanking the Creator for his protection and invoking his blessing; the other of declining on behalf of their children, the religious services of any person in whose creed they may not concur, or for other reasons satisfactory to themselves.*¹⁹

The Regents Prayer Case caused a national storm of criticism—characterized by Paul Freund of Harvard Law School as a mere “intemperate outburst” but in fact expressing a widespread and profound anxiety over the ultimate significance of the decision. The Supreme Court, with but one dissent (that of Justice Stewart), had banned the prayer because it was religious. The Court’s words were:

...the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York’s program of daily invocation of God’s blessings as prescribed in the Regents’ prayer is a *religious activity*.²⁰

The country read the matter rightly. “Religious activity”—*any* religious activity—was now purged from the schools which most children attend. There followed, next term, a third in the trilogy of cases relating to religion in the public schools—and hence vitally affecting parental rights in education. The Supreme Court’s decision in that case has been propagandized as an historic balancing of interests in religious liberty as against the public interest in non-establishment of religion in the schools. It is nothing of the sort. Rather it was an elaborate attempt of the Court to defuse the intense controversy which followed its *Engel* decision. The case, *Abington Township School District v. Schempp*, was actually a pair of cases—the Lord’s Prayer case from Maryland and the Bible-reading case from Pennsylvania.

The plaintiffs in the Pennsylvania case were Unitarian parents and their children; those in the Maryland case were

Madalyn Murray and her son, both professed atheists. No parents favoring the practices were parties in these litigations. The well-known fact that the Court struck down the practices as establishing religion is of less significance than the prescription which the Court penned on the nature of religion and establishing the thing it disavowed establishing: a "religion of secularism" in the public schools. Since the compulsory attendance laws would drive all children into the public schools, except for those whose parents desired, and could afford, private education for them, this establishment was of enormous consequence to parental rights.

The Court had insisted that it was not establishing a "religion of secularism" in the public school—with this significant qualifier: "... *in the sense of affirmatively opposing or showing hostility to religion.*" But what if religion were simply ignored? Surely, by ignoring a thing—especially when we speak of leaving it out of the curriculum of the school-age child—we do teach, to say the least, its unimportance. The Court did not face up to that question. It substituted its own *religious* judgment that the omission would be sufficiently made up for by installing courses in comparative religion, in the history of religion, or study of the Bible for its literary and historic qualities. Religion itself could be studied if presented "objectively as part of a secular program of education." This prescription has been totally unacceptable to those many believers who do not conceive of religion as a secular matter, who consider the Bible as the word of God and who abhor comparative religion as destructive of belief. If the parent wanted the real thing for his child, religion—not as a secular program, but as religion—that could not be had where the child, at the most sensitive stage of being, would spend most of his learning years, most of his days, and most of his hours in each day. No, said the Court, the place for that was in "the home, the church, and the unviolable citadel of the [child's] mind and heart." The home and the church were thus relegated to weak collateral positions on the periphery of the educational process.

Parental Rights in Schooling

Justice Stewart, the sole dissenter in *Schempp*, clearly exposed the falsity of the Court's elaborate and deceptive rationale:

With all its surface persuasiveness, however, this argument seriously misconceives the basic constitutional justification for permitting the exercises at issue in these cases. For a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.²¹

The new religion, officially installed, would now become the dominant factor in the formation of the new generations and the almost inevitable determinant of the national future. The consequences to parental rights would be of great significance.

Life Under The Establishment

By the close of the two decades following *Schempp*, attacks on public education had become intense and widespread. The critics were parents, some parents protesting the decline of academic quality of the public schools, others the sometimes chaotic lack of discipline and order, others the psychological manipulating of children in order to mold them to accept state-chosen attitudes for the living of their lives and for their participating in society.²² Parental resistance to all of this took two forms: resort to private education, and various forms of protest aimed directly at public schools. At a later point we will examine what successes and failures parents have had in defending their rights in private education. We consider now defense of the parental right from within the public establishment.

Two points need be gotten out of the way at the outset:

(a) the "small minority" argument made by overzealous defenders of public education, and (b) the "willfulness" argument of some parents. Each attacks the other as utterly insincere.

The "small minority" point, everlastingly repeated by public school propagandists, insists that parental criticism of the public schools—especially on moral grounds—is nothing more than the work of a small but strident minority. Thus parents who may finally be moved to object to the placing of morally corrupting books on school library shelves, are typically lampooned as "book burners", who, though dangerous, may be scornfully dismissed as a handful of self-starters seeking to impose their views on the great majority. The smallness of their numbers is as much stressed as their "divisiveness". What this argument carefully avoids is the very point highlighted when Vashti McCollum, the *Engel* plaintiffs, the Schempps, Madalyn Murray and their pressure group supporters headed into court: the preciousness of *minority* rights. Marvelous are the works of bias: those who litigated to secularize the public schools were "lonely dissenters" (though lonely they were not) "standing up to the tyranny of the majority"; but parents who have sought to protect their children against moral defilement in the public schools are savaged by the same sources as rednecks, crypto-fascists, eager for a *Kristallnacht* at Woodrow Wilson Elementary.

The "willfulness" point is this: some parents who protect philosophic and moral evils they encounter in the public schools assume that every local and state public school official is hell-bent on promoting those evils and inventing new ones. These parents fail to see that the evils are essentially the product of the secularizing decisions of the Supreme Court. These, by removing seemingly minimal and certainly vestigial theistic observances from the schools (or options for the same) have only removed what was largely symbolic, it is true; but the symbols summarized a whole philosophy of life, just as the obliterations of the symbols summarized a radically different philosophy of life. Whether the latter could succeed without the ultimate guidance of theistic principle, without the sanction of ten

precepts which are "commandments" only because believed to be given by an immutable power deemed transcendent to "society", majorities, or government, remained to be discovered. And the discovery, thereafter, of moral chaos in the public schools gave many parents an answer. But in many cases the local teachers and other school officials were powerless to prevent the ill effects which inevitably flowed downward from the Court's decisions. In the many school districts of the country where the old theistic moral sanctions had been implicit (but often explicit), in the school regimen, life went on—the lives of children, that is, with all of their questions, probings, problems, varieties of conduct, and personal crises. To these guidance or responses had to be given. The overall question being: how should life be lived? the answer had to omit being grounded in a transcendent and universal ethic deemed binding. If a child were to ask why not steal? the answer would be because it isn't fair, because we don't do it at Woodrow Wilson High, because it isn't nice, because it's anti-social, because democracy frowns upon it, because you wouldn't like someone to steal from you—but each of those answers was a surface answer only, easily opening up further questions.

Aware of the moral vacuum created by the de-religionizing decisions of the Supreme Court, other forces now rushed in. And over the next two decades answers to the questions of how life shall be lived were widely installed in the public schools.

Philosophic sources for the new values were to be found in the prescriptions of, for example, Professor Ulich, who, in 1965, said he saw the public school teacher as having a mission to

... educate free minds who, on the one hand, appreciate the depths of man's religious tradition but to whom, on the other hand, the old denominational and dualistic conflicts appear secondary, if not inhibitive to, a unifying world outlook.²³

The meaning was that the teacher's task is to teach children, regardless of their religious background, that Lutheranism, Judaism, Catholicism, etc., (a) have profound traditions,

but (b) their disagreements—*i.e.*, *doctrinal* differences—are “secondary”; these will inhibit the children’s having a “unifying world outlook”. (Not to worry: that will be supplied them.)

Other chapters in this book will enlarge upon the problems encountered by parents with respect to public education. These have included sex courses (often under another label such as “Health,” “Hygiene”, etc.) and instruction in Marxian or other materialist social views (again under a variety of headings such as “Social Studies”, “Problems of Democracy”, “Population Problems”, etc.). For those parents forced by economic circumstances, the unavailability to them of private education, or simply a strong desire for public education (but one non-intrusive upon, say, Christian values), what avenues of relief exist? Three suggest themselves (1) grass roots action at the local school board level, (2) legislation, (3) litigation.

Parent action at the local level has been at times effective in helping achieve the ouster of teachers who have violated the consciences of parents by unacceptable teaching or conduct, or in convincing school boards that particular course content, or books or other instructional materials are offensive and should be barred. But where programs are imposed by statute, grass roots protests may not succeed. Such protests, too, often encounter the factors of the inertia of the many parents who don’t care and the strident counterattack of those who desire the programs to be imposed upon all children and attack proponents of child freedom as “book burners”.

Legislation is at once the soundest basis for protecting parental freedoms in education and the most difficult to achieve. The changing of state laws so as to eliminate offensive items from the mandated curricula and to put clear limits upon the freedom of administrators and teachers to impose or suggest secularist values calls not only for meticulous drafting but for major political clout. Except where parents can find strong allies in politically effective statewide lobbies (such as, for example, church organizations) they are likely to be outpressured by the well fi-

nanced groups which often were responsible for putting the bad legislation in place to begin with.

An example of a legislative effort currently being made at the federal level is, however, instructive. The "equal access" proposal²⁴ calls for cutoff of federal funds to any public school district which would deny high school students the right to form their own religious organizations and to conduct meetings of them on campus. Here would be a meaningful accommodation to the religious and moral liberties of students (and hence to parental liberties). At the least, the enjoyment of rather commonplace liberties to associate, to learn and to discuss ideas—in the setting (the school) most appropriate for such intellectual and fraternal undertakings would be given protection. The proposal is modest. It is limited to high schools. If enacted, it would be only a useful and desirable makeweight to the pervasively secularist regime of the public school. As of this writing, the "equal access" legislative effort is instructive in two ways: it shows that good drafting and competent salesmanship of a reasonable idea *can* succeed. As of this writing, the "equal access" measure has not passed. But that it very nearly did pass the House without the aid of a large national lobby and of a long campaign, is encouraging. The bill's defeat in the House in May is also instructive. It was due to the intensive opposition of essentially the same pressure groups which had supported the *McCollum*, *Engel* and *Schempp* challenges to the accommodation of religious liberty in the public school. Nothing more vividly illustrates the almost fanatical will to impose secularism upon the nation's children than the furious campaign to suppress "equal access".

Litigation has by and large thus far proved an unsuccessful avenue of relief for parents who oppose a secularist regime in the public schools. Many of the failed cases, however, have been cases in which all essential constitutional issues were not raised or good trial records developed. (A promising exception appears to be the Creationism litigation presently in the U.S. District Court for the Eastern District of Louisiana.²⁵) If parental freedoms are

to be vindicated in the courts, it will be essential that *all* relevant constitutional issues will be raised, sharply defined, and then given life through thoroughly developed trial records. The issues to be raised involve much more than the familiar attack on "Secular Humanism". Rights to know, to learn and to teach (and other academic liberties), rights of familial privacy (including sexual privacy), and rights against enforced indoctrination are the bases of essential issues to be raised, along with, for many parents, moral and religious liberty.

For those who have come to doubt the worthwhileness of struggle on the front of parental freedom, the *Studs Terkel* case, in 1982, should lend a sense of hope. Highlighted in the media as a case of "book burning", it was in fact a case of "book forcing". The case is spoken of as the "Studs Terkel" case because the media played up the well-known Chicago journalist as the hero of the event. The media also lampooned the parents whose liberties were extinguished by a public school board, and ignored the two boys whose heroic stand was finally vindicated (as the media also ignored the vindication). The affair is a laboratory example of a parental rights crisis—where parents prevailed over the bureaucracy.

The facts are simple. The Girard (Pennsylvania) High School assigned Terkel's book, *WORKING*, a best seller, for reading by the students. Two boys of Christian background refused to read it since the book contains much foul language, repeated irreverent use of the names of Christ and God, and a chapter (entitled "Hooker") describing the life of a prostitute and classifying her career as one among many fields of gainful occupation, or work. The boys and their parents vigorously objected to the assignment. They requested an alternative assignment. This was denied them. One of their parents then formally requested either that *WORKING* be withdrawn from use by the School District or that the boys be given alternative assignments. The School District refused, upholding the teacher's position that it was important to introduce her students to "the present

reality of work and the working world." At a public hearing which ensued, the public school directors, invited Lester "Studs" Terkel to come to Girard High School to discuss his book. Terkel appeared at two assemblies held at the school, and liberally used these forums to ridicule those who had objected to his book. National media coverage of the event was approved and assisted by the school authorities. The atmosphere thus engendered was one wherein Terkel was lionized by the school and in which the boys were pressured to recant, forego their religious and moral convictions, and conform to the school's demand. The press and national TV informed America that here was an attack on public education brought by "book burners".

The School Board on March 22, 1982, voted to deny the parents' request for an alternative reading, stating that "portions of the book may well be offensive to them and their children. *With all deference due the parents, their sensibilities are not the full measure of what is proper education.*" The Board then ruled that failure of the boys to read the assignments would prevent their graduating from Girard High School on June 2, 1982.

The parents (people of modest financial means) were able to obtain free legal counsel who proceeded to draft a complaint, on their behalf and that of the boys, against the school authorities, alleging violation of freedom of conscience, of religion and parental rights. The complaint pointed to the obvious "book forcing" in the Board's refusal to make any assignment to the boys from the myriad sources of literature available.

About to be faced publicly with the *real* issue (book forcing) instead of the bogus issue ("book burning") and the possibility of court trial and an injunction, the School Board dropped its plan to punish the two boys for having sought to enjoy freedom of conscience and mind in a public school. The media suddenly lost interest in the case. As an interesting postscript, the liberal lawyer-writer, Nat Hentoff, caught up with the case some months later and, in a series of articles in *Village Voice*, soundly berated the

Girard School Board for its suppression of civil liberties. Hentoff went to the heart of the matter:

Contrary to the pietism of some insatiably anticlerical civil libertarians (which means they are flawed civil libertarians), the purpose of the public schools is *not* to homogenize children but to respect their differences. Kids have a First Amendment right to *be* different, to *believe* differently, in the public schools. And, Justice Robert Jackson added, 'Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.' ²⁶

THE PRIVATE SCHOOL CRISIS

While the exercise of critically important parental rights in public education remains frustrated, in private education the situation has been mixed, with significant victories achieved and major defeats. Our focus here is not, of course, upon parents who have chosen private schools whose policy is to subject themselves totally to whatever the state educational offices may require. Many private schools desire to be in what they deem the "mainstream"; they hence appear to conceive that the bureaucracy possesses true educational wisdom. They find it useful to advertise that they are "state-chartered", "state-accredited" or "state-approved". (And these submissions may also bring rewards in terms of state financial aid.) Here are obviously no parental rights issues; no parental rights are being asserted or challenged.

The "private school crisis" to which we now turn is that which occurs when parents deliberately choose a school which does not conform to the educational prescriptions of the bureaucracy or will not take a state license to exist. This crisis is principally seen in those cases of the past decade and a half involving evangelical and fundamentalist Christian schools. While these cases center upon the religious liberty of parents (and often of churches and teachers), they in fact embrace a wide range of First Amendment freedoms. These cases have arisen in Vermont, Ohio, Ne-

Parental Rights in Schooling

braska, Kentucky, North Dakota, Iowa, Maine and some other states. Perhaps the case best representative of these new parental rights struggles is the *Rudasill* case which arose in Kentucky in 1977.

In *Rudasill* the Kentucky State Board of Education, profoundly agitated that small fundamentalist Christian schools were springing up without seeking state "approval" (licensing), decided that it must stamp out such dangerous insurrection. The chairman of the State Board appeared especially provoked by the fact that the fundamentalist parents desired their children to be in schools which taught that "everything in the Bible is literally true." When the parents and pastors refused to buckle, a Herodian decree issued from the State Board: any parent in Kentucky who had a child enrolled in a non-"approved" school must be criminally prosecuted. But as the parent hunt was about to start, the hunted became the hunters: parents went into Franklin County Circuit Court and—on First Amendment grounds—obtained a preliminary injunction against the Commonwealth. That set the stage for full trial.

Is it the bureaucracy's paranoia or is it the bureaucracy's swollen vanity which, in so many cases where it has warred against religious schools, causes it to treat the cases as supreme emergencies, justifying any sort of expenditure of the people's money? Kentucky now at once retained outside counsel to defend it—a former governor of Kentucky and senior partner in one of the largest firms in the state. Somehow, missing from the bureaucracy's thoughts as it prepared to stamp out dissidence, was consideration by the state of its *own* household. Upon the lengthy trial which now ensued, the glaring contrasts between Kentucky's public schools and the Christian schools became evident—and not to the advantage of the State Board's case.

One of the worst disadvantages which the state suffered upon the trial was the very testimony from which the state was most sure it would benefit: that of the Christian parents. These were supposed to be ignorant folk, far less able to discern what was best for their children than was the state. The state's scenario, furthermore, read that it was the state

which really loved the kids and whose motherly instincts would best protect them from the harm of "bad education". The parents, on the witness stand, disappointed the state's expectations—nay, confounded the state.

The parents' case, however, did not consist essentially of defense. They soon had on line a parade of expert witnesses, and a progression of exhibits, which shortly reversed the role which the state had been confident it would play in the trial. Cockily opening on the grand presumption that the state alone has competence in education, the state was soon brought unpleasantly close to the question of whether, in view of the calamitous state of public education in Kentucky, it had *any* real competence in education. While Christian parents were to be criminally prosecuted for the "truancy" of having their children in "unapproved" schools, the truancy officer in Louisville was forced to testify that wholesale public school truancy had long been taking place—*real* truancy, that is—and largely unprosecuted. Too, the state, confronted with the good results in nationally standardized basic skills tests taken by the Christian school children, was forced to acknowledge (a) that public school children were not similarly tested and (b) to go on to state the absurdity that testing proves nothing.

Put into sharp focus in the Kentucky trial was the constant theme of values. The State Board appeared particularly concerned that it keep a tight grip on who should teach in Kentucky and what should be taught. The parents' testimony, on the other hand, saw these areas as intimately related to the most important thing of all—the freedom of their children to absorb precisely the values for which the parents had chosen the schools and to have no values alien to these imposed.

The trial court held in favor of the parents. The State Board appealed. On October 9, 1979, the Supreme Court of Kentucky handed down a remarkable decision in the case. It, too, upheld the parents but did so on a striking basis—an ancient provision of the Kentucky Bill of Rights which reads as follows:

Parental Rights in Schooling

Sec. 5 Right of religious freedom.—No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; *nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed*; and the civil rights privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience. (Emphasis added.)

Because a state Supreme Court's interpretation of its own state constitution is final and ordinarily not reviewable by the Supreme Court of the United States, the latter court rejected the State Board's effort to secure a reversal of the parental rights upheld by the Kentucky Supreme Court. Only one other Christian school case has reached the Supreme Court of the United States, the now famous *Faith Baptist* case out of Nebraska.²⁷ This case was, however, a poor vehicle to test the basic issues involved, and the Supreme Court declined to hear argument in it. Thus it can be said at the present that the Supreme Court has not yet passed upon all the specific issues which a case such as the *Rudasill* case raises. One of these days, the Court will undoubtedly take such a case for review, and when it does it is to be hoped that the case will be one in which a strong trial record delineating parental rights, and exploring state presumptions, will have been made. Meanwhile, because of their singular relationship to our wider liberties, the cases involving rights to educate outside of state control must be well defended.

POSTSCRIPT: PARENTAL RIGHTS AND PUBLIC AID

In the 1960s the focus of argument on parental rights was public aid to religious schools—or to children in them, or to their parents. Distributive justice, so it was said, entitled

parents whose conscience directed them to educate their children in religious schools, required that the education be given participation in tax benefits. It was inherently unfair that, if the public interest value of the compulsory attendance laws was achieved by enrollment in a religious school no less than in a public school, tax dollars should not support the religious school education. Religious schools contribute at least equally to the common good. Why should a parent pay twice for education—once to support the public school and again to support a private school of conscientious choice? And did that not, in effect, render that parent a "second class citizen"?

Identified throughout the 1960s as an advocate of public aid to the religious school interest, I have since revised my views of the matter. First, while I earlier readily acknowledged that worries concerning some degree of public control accompanying such aid should be discounted in view of the benefit to educational freedom which the aid would effect, it became apparent to me a decade ago, that anything but absolutely minimal public control, carefully limited in scope to specific programs of aid, is dangerous to the genuinely religious school. If a child in a religious school is afforded school bus transportation at public expense, and public controls of that program are limited to the transportation and in no way reach into the life of the school, fine. But any form of aid (whether designated as aid to the child, to the parent, or to the school) which would impose standards or programs upon the school beyond its being one in which a child can fulfill his attendance requirement under an absolutely minimal truancy law should be deemed unacceptable. That is, of course, if the school has high self respect and a strong sense of its religious integrity. It is basic and right that public controls follow public expenditures. True, the controls should always be limited to the specific thing which the public buys. The public, however, cannot do much buying in the field of education before it is buying into *value* areas—teachers, curriculum, teaching methods, pupil performance, "standards" of all sorts. Those programs upheld by the Supreme

Court in *Meek v. Pittenger* and *School District of Pittsburgh vs. Commonwealth of Pennsylvania, et al.*, undoubtedly represent the outer limits of program support which private—and especially religious—schools should consider tolerable. The private school crisis presented by the NLRB and unemployment compensation cases—but especially the school licensing cases in Ohio, Kentucky, Vermont, Nebraska, Maine, Michigan and North Dakota—indicate, disturbingly, the mind-set of all too many governmental agencies that it is their responsibility to manage areas of private education or all of private education.

Second, it is now abundantly clear that public aid, even if it were to be without strings attached, is *not* indispensable to parents who want private education. That is especially true with respect to religious private education. The Catholic school system originated with immigrants, powerless and penniless in the American society. Catholic schools, in the depths of the depression, *were being built*, not closed. One thing caused this: the intensity of Catholic religious faith. Though public aid had been sought for Catholic schools at least as early as the 1840's, such aid had been carefully denied—even to the point of amending state constitutions to insure that legislatures could never grant it. It has been said that the Catholic schools were able to flourish nonetheless because of the large number of nuns who, under vows of poverty, staffed the schools. But that, too, was due simply and solely to the same factor: the intensity of Catholic religious faith. No quantity of public funding, however great (and even if it were without strings) can cause religious schools to be strong and to multiply. Funding may, indeed, *weaken* such schools not only because of the inevitable bureaucratic controls which it will impose, but because of what it may do to initiative, the spirit of sacrifice, and the dedication of religious adherents.

The evangelical and fundamentalist Christian school movements, originating in the 1960s and now highly visible in all fifty states, bear out the truth of the foregoing. Schools of generally fine quality, which have resulted are flourishing without public aid; indeed, they adamantly refuse

public aid, even the "aid-to-the-child" kind (except, in some few instances, public housing).²⁸ Parents, pastors and teachers in such schools have made heavy financial sacrifices in order to establish and maintain these schools in the past two decades of inflation, high taxes and employment insecurity, and aggressive punitive tactics by state and federal bureaucracies. The teachers are especially noteworthy to the observer of the schools as dedicated religious who serve the children committed to their charge at heroic personal sacrifice. But in nothing has the strength of the Christian school movement been more strikingly shown than in the willingness of its members to face fines and imprisonment for the sake of their faith. The trial scenario in the aforementioned *Rudasill v. Kentucky State Board of Education*²⁹ is "must" reading for anyone seriously interested in American freedoms and, in particular, parental rights.

The conclusion that private schools should not be governmentally subsidized, however, cannot be the end of our inquiry. Left standing is an injustice and a major danger.

The injustice pertains to the fact that parents who exercise a constitutional liberty to choose non-government education for their children are yet taxed to pay for government schools. The steady rise in per-pupil education cost in the past two decades (leaving out of account special costs attributable to unnecessary public educational ventures) threatens parents who desire to maintain non-governmental schools and who choose to reject the state schools. It is nonsense to say that those parents are yet "perfectly free" to choose non-public education. This chapter is not the place for exposition of the legal means whereby the injustice of a double burden of educational cost can be eliminated, but the governing principle is clear: if the parent meets the requirements of a reasonable compulsory attendance law by paying for a non-governmental education for his child, that parent should not be required to pay for another education which he does not choose.

The danger pertains to the fact that the state may become the almost exclusive educator of children—and thus the

molder of the citizenry—by virtue of this almost unlimited financial power. Due to the Supreme Court rulings discussed in this chapter, this means the state-compelled funding of secularism. If the school tax is so structured as to provide the tax relief we have suggested, then it will be possible to have a philosophical pluralism in American education, the healthful existence of genuine parental choice, and the consequent reduction of the danger of a totalitarian society.

Footnotes

1. *Wisconsin v. Yoder* 406 U.S. 205 (1972).
2. See, e.g., Thomas Dubay, *Philosophy of the State as Educator* (Milwaukee: Bruce Publishing Company, 1959) pp. 55-57.
3. *Ibid.*, pp. 55-57.
4. *Ibid.*, p. 63.
5. See, O.J. Scott, "The Government As Parent", *Cabalcedon Report*, Apr. 24, 1984.
6. Prime sources of information are John Holt whose newsletter, *Growing Without Schooling*, is an invaluable source of current information (729 Boylston Street, Boston, MA 02116), Ed Nagel's National Association For The Legal Support Of Alternative Schooling, P.O. Box 2823, Santa Fe, NM 87501, and Dr. Raymond Moore, Hewitt Research Foundation, P.O. Box 9, 36211 S.E. Sunset View, Washougal, WA 98671.
7. A noteworthy exception has been seen in the Roman Catholic bishops of Pennsylvania whose successful resistance to the imposition of NLRB jurisdiction on Catholic schools caused them to refuse to submit even to initial NLRB proceedings as a step antecedent to appealing therefrom into the courts. Instead they attacked NLRB jurisdiction from the outset by suing for an injunction to bar *any* NLRB proceedings. They succeeded. See *Caulfield v. Hirsch*, — F. Supp. —, 95 LRRM 3164 (E.D. Pa., 1972); *McCormick v. Hirsch*, 430 F.Supp. 1337 (1978).
8. *Sloan v. Lemon*, 413 U.S. 825 (1973), affords a good example. Here a state statute had provided for tuition grants to parents of children in nonpublic schools. Then the statute was challenged on church-state separation grounds. Although parents intervened in support of the statute, claiming themselves and their children to be the sole beneficiaries of the legislation, the Supreme Court held the statutes a disguised subsidy to religious schools, not so much as discussing whether a parental interest might be involved.
9. L. and R. Lichter and S. Rothman, "Media and Business Elites", *Public Opinion*, October/November, 1981. This study of the nation's major media executives concluded that they seek to use their programming to create a new society based upon secular humanist presumptions and values.

A Blueprint For Education Reform

10. *McCollum v. Board of Education*, 333 U.S. 204 (1948).
11. Although parents were role actors as parties, the litigation scenarios were, in the main, attributable to major organizations whose programs called for a complete revolution in the values by which American children in the public schools should be molded.
12. *Engel v. Vitale*, 370 U.S. 421 (1962).
13. *Abington Township School District v. Schempp*, 374 U.S. 203 (1963).
14. The basic inventing occurred in *Everson v. Board of Education*, 330 U.S. 1 (1947), wherein Justice Hugo Black, in dictum, speaking for the Court, devised a view of the Establishment Clause, completely unknown to history, whereby the Clause was seen to bar any use of tax money "to support any religious activities" (*id.*, at 15-16) apparently without regard to any consequence to the consciences of those tax-paying parents and their children who could not accept a sterile irreligious learning environment for their children.
15. These groups in the three cases were General Conference of Seventh-day Adventists, American Civil Liberties Union, Synagogue Council of America, American Ethical Union, Joint Conference Committee on Public Relations (Baptist Convention), American Unitarian Association, American Jewish Committee, and American Humanist Association.
16. She prevailed although she had failed to allege any violation of the federal Constitution. The Supreme Court said that the fact that the Illinois courts had dealt with such question sufficed.
17. *Lemon v. Kurtzman*, 403 U.S. 602, 689 (1971).
18. "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."
19. *Engel v. Vitale*, 206 N.Y.S. 2d 183, 192 (1961).
20. *Engel v. Vitale*, 370 U.S. 421, 424 (1962). (Emphasis supplied.)
21. *Schempp*, *supra*, at 313.
22. See: Barbara M. Morris, *Change Agents in the Schools* (Barbara M. Morris Report, Ellicott City, Md., 1979), Tim LaHaye, *The Battle for the Mind* (Old Tappan, N.J.: Revell, 1980), Jeane Westin, *The Coming Parent Revolution* (Chicago: Rand McNally, 1981).
23. P. Freund and R. Ulich, *Religion and the Public Schools* (Cambridge, Mass.: Harvard University Press, 1965), p. 50.
24. H.R. 4996, 98th Cong., 2d Sess., "Religious Speech Protection Act". If the Congress declines to enact "equal access" legislation, it is to be hoped that the decision of the United States District Court for the Middle District of Pennsylvania in *Bender v. Williamsport Area School District*, 563 F.Supp. 697 (M.D. Pa., 1983) upholding the "equal access" principle on free speech grounds, will be affirmed.
25. *Aguillard v. Treen*, No. 81-4787 (E.D. La.).
26. N. Hentoff, "Not All My Books' Enemies Are My Enemies", *The Village Voice*, May 10, 1983, p. 4.
27. *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, *appeal dismissed*, 454 U.S. 803 (1981).

Parental Rights in Schooling

28. In Ohio and Pennsylvania, where various sorts of "auxiliary services" now have U.S. Supreme Court sanction, these are largely declined by evangelical and fundamentalist schools. They are wary, for example of state-supported so-called guidance and counseling services due to attitudes and values which the counselors may manifest.

29. *Rudasill v. Kentucky State Board of Education*, 589 S.W.2d 877 (1979), cert. den., 446 U.S. 938 (1980).